Office-Supreme Court, U.S.
FILED
NOV 9 1964
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

October Term, 1964

No. 662

OREGON STEVEDORING COMPANY, INC.,
Petitioner,

v.

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRAY, FREDRICKSON & HEATH,
FLOYD A. FREDRICKSON,
Counsel for Petitioner,
1005 Equitable Building,
Portland 4, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-64

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	4
1. Important Question of Federal Law Not Settled	4
2. Decision in Conflict with Applicable Decisions of this Court	6
Conclusion	8
Appendix A — Opinion of Court of Appeals	9
Appendix B — Judgment of Court of Appeals	16

CITATIONS

CASES

Alaska S.S. Co. v. Petterson, 347 U.S. 396	5
American Stevedores v. Porello, 330 U.S. 446	4
Bisso v. Inland Waterways Corp., 349 U.S. 85	8
Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U.S. 315	3, 4,6
Ryan Stevedore Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124	2, 4, 5, 6, 7,8

STATUTES

Uniform Commercial Code	7
28 U.S.C § 1254 (1)	2

In the Supreme Court
of the United States

October Term, 1964

No.————

OREGON STEVEDORING COMPANY, INC.,
Petitioner,

v.

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 1, 1964.

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the District of Oregon is not reported. It is set forth at pages 21-23 of the printed Transcript of Record.

The opinion of the Court of Appeals on remand of this case from the Supreme Court of the United States is printed in the appendix hereto, *infra*, pp. 9-15, and is reported at 336 F.2d 124.

JURISDICTION

The judgment of the Court of Appeals was entered September 1, 1964 (Appendix p. 16). This petition for a writ of certiorari is filed less than 90 days after the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is there any public policy reason why a stevedore company cannot limit its *Ryan*[1] obligation to indemnify a shipowner for loss sustained because of breach of the warranty of workmanlike service by language in its contract with the shipowner limiting its obligation to one of non-negligent conduct?

2. Does the language in a stevedoring contract whereby the shipowner agrees to be responsible for its negligence and failure of ship's gear and the stevedore agrees to be responsible for its negligence limit the stevedore to indemnify the shipowner only for the negligence of the stevedore or does it mean the stevedore must still indemnify for non-negligent conduct which breaches the warranty of workmanlike service?

---

[1] *Ryan Stevedore Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124.

STATEMENT OF THE CASE

The simple facts of this case are set forth by this Court in its prior opinion. 376 U.S. pp. 315-318. The present petitioner, stevedore, supplied a defective tent tie-down rope to the present respondent, shipowner, in connection with its contract to load and discharge respondent's vessels. A longshoreman was injured because of the defective rope and recovered damages from respondent on the basis the defective rope made the ship unseaworthy. The respondent sought indemnity from the petitioner. There was a written contract between the parties which provided the stevedore company would be responsible for negligence and the steamship company would be responsible for negligence or for failure of the ship's gear or equipment.[2] The trial judge found the stevedore free of negligence and found the contract limited its liability to its negligence.[3] This Court, after determining the implied warranty of workmanlike service had been breached by the non-negligent supplying of a defective tie-down rope, re-

---

[2] Paragraph VIII of the agreement states:

"The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

[3] Transcript, pp. 21-23.

manded the case to the Court of Appeals to determine the effect of paragraph VIII of the contract between petitioner and respondent. 376 U.S. at p. 324. Upon remand, the Court of Appeals reversed the decree of the District Court dismissing respondent's Libel and directed the District Court to enter judgment in favor of respondent for indemnity (Appendix p. 15). The Court of Appeals held that the contract whereby the petitioner expressly agreed to be responsible for negligence did not relieve the petitioner of an implied obligation to supply equipment free of defects and hence to indemnify for non-negligent conduct.

REASONS FOR GRANTING THE WRIT

1. Important Question of Federal Law Not Settled.

It has been clear since the decision in *American Stevedores v. Porello,* 330 U.S. 446, that a stevedore contract including the provisions for indemnification is governed by federal law. Indeed the opinion of the Court in this case reaffirmed the principle. 376 U.S. at p. 324. Since the decision in *Ryan Stevedore Co. v Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956), stevedore companies and steamship companies have resorted to contractual stipulations to determine their responsibilities vis-a-vis each other for injuries to longshoremen. About 92 percent of the stevedore work on the West Coast is performed pursuant to written contracts with shipowners and approximately 79 percent of these written contracts have some form of indemnity clause, allocating between shipowner and stevedore responsi-

bility for shipboard injury to longshoremen and other persons. Furthermore, in most instances insurance rates and stevedore rates have been adjusted in conformity with the allocation of responsibility by contract. Indeed, clause VII of the contract involved here ties insurance into the indemnity clause (Tr. 34). It is presumed the same development has taken place on the East Coast and Gulf Coast.

By 1956, the case of *Alaska S.S. Co. v. Petterson,* 347 U.S. 396, had decided a shipowner was liable to a longshoreman for injuries resulting from defective equipment brought aboard the vessel by a stevedore. Stevedore supplied gear is considered a part of ship's gear in order to extend the warranty of seaworthiness to gear not owned by the shipowner. The stevedores, aware of their responsibility under *Ryan,* prepared their contracts accordingly. The shipowner was made responsible for gear and the stevedore agreed to be responsible for negligence. The Supreme Court has not heretofore interpreted such a contract, and it is important to a large industry that it do so. Such clauses are common in stevedore contracts and this Court should establish a uniform interpretation of such language to guide the industry. First, it should advise if such clauses are in any way against public policy. Second, it should advise if the language is appropriate to limit the *Ryan* obligation. Particularly is it important to have these questions answered where three members of this Court who have spoken construing this language reached a decision contrary to the Court of Appeals.

"Finally, the contract under which the parties dealt here provided that the stevedoring company was to be liable for personal injuries resulting from its negligence, while the shipowner was to be liable for injury caused by its own negligence 'or by reason of the failure of the ship's gear and/or equipment.' This provision appears on its face to put the burden of liability for unseaworthiness, which was the basis of the worker's recovery here, on the shipowner, leaving negligence as the only basis on which the stevedoring company could be held liable. The District Court so held. The contract is before us, and we are as competent to interpret it now, without remanding to the Court of Appeals, as we are to invoke 'policy' reasons in order to expand *Ryan* and impose new financial burdens on stevedoring companies in plain violation of the policy Congress adopted in the Longshoremen's and Harbor Workers' Compensation Act." 376 U.S. 326.

2. Decision in Conflict with Applicable Decisions of This Court.

The warranty of workmanlike service which arises from a stevedore's agreement to load or unload a vessel is a consensual obligation unlike the implied in law obligation of the fitness of a product.[4] It follows, therefore, that the parties to the agreement may alter this obligation at will and it is not necessary to expressly disclaim the warranty such as is required in the law

[4] "This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract." *Ryan Stevedore Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133.

of sales.[5] While the Court of Appeals does not expressly refer to the law of sales, it is clear that it uses it as a guide to its construction of the contract. "The contract does not expressly negate the existence of the implied in fact obligation to perform stevedoring services in a workmanlike manner,"[6] and, therefore, the absolute warranty of fitness of equipment is still present. This decision does not harmonize with the basic reasoning of *Ryan*. *Ryan* allowed indemnity to a shipowner on the basis the stevedore had in fact impliedly agreed to perform in a workmanlike manner. In this case, the stevedore expressly agreed to perform in a non-negligent manner. It only agreed to be responsible for negligence. It did not agree to be responsible for anything further. If the Court of Appeals is correct, the parties accomplished nothing by their agreement. They simply performed a useless act because the stevedore was already responsible under *Ryan* for both negligence and breach of warranty and remained with exactly the same responsibility after executing the agreement. It is axiomatic that a contract should be construed so as to give effect to all its language; and to give effect to paragraph VIII, it is clear that the stevedore must be deemed to have consented to be responsible for negligence only.

While not expressed by the Court of Apeals, it is seemingly of the view that there is some public policy reason why such a contractural provision as involved here should not be given effect. It is peculiarly the function of the Supreme Court to decide the effect to be

---

[5] Uniform Commercial Code § 2-316, Comments 1, 3, 4.

[6] Appendix, p. 8a.

given to such contractual delineations of responsibility in maritime contracts. This Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, set forth the considerations to be applied in determining whether a stipulation relieving a party from liability in admiralty contracts is valid. Such stipulations are void as against public policy if they do not discourage negligent conduct or if they result in those in need of goods and services being overreached. 349 U.S. 91. Neither of these considerations is applicable here. The stevedore agrees to be responsible for negligence and the shipowner is the one who controls the bargain. In the Port of Portland alone, there are five stevedoring companies vying for the opportunity to service the shipowner. There is no reason why the Court of Appeals, if it had followed *Ryan,* should not have given effect to the agreement of the parties and allowed the petitioner to limit its liability to negligence as was stated in the contract.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH,
FLOYD A. FREDRICKSON,
Counsel for Petitioner,
1005 Equitable Building,
Portland 4, Oregon

November 2, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, *Appellant,*)
vs.) No. 17,616
OREGON STEVEDORING COMPANY, INC., *Appellee.*)

[September 1, 1964]

On Remand from the Supreme Court of the United States.

Before: BARNES, HAMLIN and JERTBERG, Circuit Judges.

JERTBERG, Circuit Judge:

This case is before us on remand from the Supreme Court of the United States, 376 U.S. 315 (1964).

Appellant, Italia, is the shipowner. Appellee, Oregon, is the stevedoring company which rendered the stevedoring services for Italia.

Prior proceedings in this case are reflected in the following extracts from the decision of the Supreme Court:

> "During the course of Oregon's stevedoring operations in Portland, one of its longshoremen employees, Griffith, was injured on the M.S. *Antonio Pacinotti* when a tent rope snapped. The rope, permanently attached to a hatch tent used to pro-

tect cargo from rain, was furnished by Oregon pursuant to its obligations to supply ordinary gear necessary for the performance of stevedoring services. The injured longshoreman sued the shipowner in a state court for negligence and unseaworthiness [3] and recovered a judgment against Italia upon a general verdict. Italia satisfied the judgment and thereupon brought this suit in a Federal District Court for idemnity from Oregon. The District Court found that the basis for Griffith's recovery was not negligence on the part of the shipowner but a condition of unseaworthiness created by the rope supplied by Oregon, which was found defective and unfit for its intended use. However, the District Court disallowed indemnity because Italia had failed to prove negligence on the part of the stevedore company, since the defective condition of the rope was not apparent. That court viewed the contractual provision rendering Oregon liable for injuries caused by its negligence as an express disclaimer against an implied warranty of workmanlike service. The Court of Appeals for the Ninth Circuit with one judge dissenting, affirmed, but solely on the ground that a stevedore's implied warranty of workmanlike service is not breached in the absence of a showing of negligence in supplying defective equipment. 310 F.2d 481." (Footnote 3 ommitted.) (pp. 317-318.)

The issue presented to the Supreme Court was "whether the warranty [implied warranty of workmanlike service] is breached where the stevedore has nonnegligently supplied defective equipment which injured one of its employees during the course of stevedoring operations."

In the course of its opinion the Supreme Court stated at page 320:

> "We think that the stevedore's implied warranty of workmanlike performance applied in these cases" [1] "is sufficiently broad to include the respondent's [Oregon's] failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct.[6]" (Footnote 6 omitted.);

and at page 318:

> "For the reasons stated below, we have determined that the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity on the stevedore's implied warranty of workmanlike service."

In concluding its opinion the Supreme Court stated:

> "The effect of the express assumption of liability for negligence provision in the contract on the existence of the implied warranty has not been briefed or argued in this court. Accordingly, the issue remains for the Court of Appeals to decide. The judgment below is reversed and the case remanded for further proceedings consistent with this opinion." (pp. 324-325.)

Hence, the only question before us on this remand concers the effect of the express assumption of liability for negligence provisions in the contract between Italia and Oregon on the existence of the implied warranty.

---

[1] The cases referred to appear on pp. 318, 319 and 320 of the Supreme Court decision.

As stated by the Supreme Court:

> "Under the contract between the companies Oregon was to have exclusive right to and control over the loading and discharge of cargoes aboard Italia's vessels [1] and was to 'furnish all the necessary labor and supervision and all ordinary gear for the performance of [these] services . . . , including winch drivers and usual appliances used for stevedoring.' Italia was to furnish and maintain in safe and efficient working conditions suitable booms, winches, blocks, steam, lights and so forth. The agreement provided that the stevedoring company would be responsible for damage to the ship, cargo, and for injury or death of any person caused by its negligence, and that the steamship company would be responsible for the injury or death of any person or damage to property arising from its negligence or by reason of failure of the ship's gear and equipment.[2]

"[1]The contract reads:

'It is mutually agreed between the parties hereto, that the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreemenent . . .'

"[2]Paragraph VIII of the agreement states:

'The Stevedoring Company will be responsible for damages to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or whether such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.'" (pp. 316-317.)

The District Court found, inter alia

1) There is no evidence outside the written contract itself as to the intent of the parties with respect to construction of the stevedore contract, or with respect to implied obligations under said contract.

2) This stevedoring contract was prepared and drawn up by respondent (Oregon) and presented in a printed form.

It is clear to us that the provision in the contract which provides that "The Steamship Company shall be responsible for injury to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment" cannot be construed to disclaim or negate the existence of the implied warranty of workmanlike service. Under the contract Oregon was required to furnish all ordinary gear, including winch drivers and usual appliances used for stevedoring and the Steamship Company was to furnish suitable booms, winches, blocks, etc. The failure of the "ship's gear and equipment" refers to the gear furnished by the shipowner and not the gear furnished by the stevedore. The hatch tent and rope were stevedore's gear and not ship's gear. The rope, permanently attached to the hatch tent, was furnished by Oregon pursuant to its obligation to supply ordinary gear necessary for the performance of stevedoring services.

To hold that the Steamship Company vis a vis the stevedore agreed to be responsible for failure of the gear furnished by the stevedore would do violence to the express language of the contract.

Oregon contends that the provision of the contract under which Oregon agrees to be responsible "for in- negates the existence of the implied-in-fact obligation to jury to or death of any person caused by its negligence" perform stevedoring services in a workmanlike manner. We do not agree. The obligation of Oregon to indemnify Italia rests not upon negligence but upon contract. The contract does not expressly negate the existence of the implied-in-fact obligation to perform stevedoring services in a workmanlike manner. See *Pettus* v. *Grace Line, Inc.*, 305 F.2d 151 (2nd Cir. 1962). Nor do we find any clear expression in the contract that it was the intent of the parties to relieve Oregon of such obligation.

As pointed out by the Supreme Court:

> "Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unload-

ing and loading portion of the ship's work, *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, cf. *Pope & Talbot* v. *Hawn,* 346 U.S. 406, they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies in the competency of the stevedore company.[9]" (Footnote 9 omitted.)

In these circumstances we are unable to hold that the parties, by the language used in the contract, intended that Oregon should be relieved of all liability to its longshoremen who might be injured solely as a result of defective equipment furnished by it and under its control.

The decree of the District Court dismissing Italia's libel is set aside and the cause is remanded to the District Court with instructions to enter judgment in favor of Italia and against Oregon for the amount of the indemnity sought.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE, Appellant,	)	No.
vs.	)	
OREGON STEVEDORING COMPANY, Inc. Appellee.	)	17,616

APPEAL from the United States District Court for the District of Oregon and upon remand from Supreme Court of the United States

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court of the District of Oregon and upon remand from Supreme Court of the United States and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the decree of the said District Court in this Cause be, and hereby is dismissing Italia's libel is set aside and the cause be and hereby is remanded to the said District Court with instructions to enter judgment in favor of Italia and against Oregon Stevedoring Company, Inc., for the amount of the indemnity sought, with costs in this Court in favor of the appellant and against the appellee.

Filed and entered September 1, 1964.

A TRUE COPY
Attest: Oct. 27, 1964.
FRANK H. SCHMID,
Clerk